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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

WILLIAM H. TOBIN, FRANK J. CANONICO, III, LARS O. ERIKSSON, DANTE E. PICCONE, KENNETH R. RICKETTS, LOUIS TREFZ, LAWRENCE J. WILLINGER, GERALD A. WOOLF,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., GE PENSION TRUST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA requires that decisions made by plan administrators who are in conflict of interest with plan beneficiaries be reviewed *de novo* by the courts.

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William H. Tobin, Frank H. Canonico, III, Lars O. Eriksson, Dante E. Piccone, Kenneth R. Ricketts, Louis Trefz, Lawrence J. Willinger, and Gerald A. Woolf respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-4a) is unreported. The opinion of the District Court (App. 7a-24a) is unpublished. It is available at 1996 U.S. Dist. Lexis 14050.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 9, 1997 (App. 5a-6a). A timely Petition for Rehearing *En Banc* was denied by the Court of Appeals on July 7, 1997 (App. 25a-26a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners are William H. Tobin, Frank H. Canonico, III, Lars O. Eriksson, Dante E. Piccone, Kenneth R. Ricketts, Louis Trefz, Lawrence J. Willinger, and Gerald A. Woolf, who filed this action in the United States District Court for the Eastern District of Pennsylvania to recover benefits under an Employee Welfare Benefit Plan and under an Employee Pension Benefit Plan maintained by their former employer, General Electric Company. The District Court had jurisdiction pursuant to 29 U.S.C. § 1132(e)(1).

Petitioners sought payment of the benefits pursuant to the Employee Retirement Income Security Act (hereinafter, ERISA), 29 U.S.C. § 1001, *et seq.* They also sought damages against

General Electric Company and its Chief Executive Officer, John F. Welch, Jr., for deliberately mischaracterizing the closing of their workplace to avoid paying them benefits due for a "plant closing," pursuant to 29 U.S.C. § 1140.[1] The District Judge granted Defendants' Motion for Summary Judgment, holding that Plaintiffs were not entitled to Plant Closing Benefits and that, therefore, there could be no claim for illegal action to prevent them from obtaining the benefits.

A. GE And The SPCO Business

Petitioners are eight former salaried, nonunion employees of Defendant General Electric Company (hereinafter, GE).[2] They became employed at GE's Static Power Components Operation (SPCO), which manufactured high powered silicon controlled semiconductors, at various times, from 1953 to 1972. The SPCO was located in Collingdale, Pennsylvania until 1985, when it was moved to Malvern, Pennsylvania.

GE is composed of twelve major businesses, as diverse as GE Capital, the National Broadcasting Company (NBC), and an aircraft engine business. The businesses are headquartered in different locations. SPCO was a part of one of those twelve businesses, GE Industrial and Power Systems. In 1985, a facility was constructed for SPCO adjacent to a building in Malvern that already housed Defendant GE's Power and Control (hereinafter, P&C) operation, in Malvern, and SPCO was moved

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1. "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . ." 29 U.S.C. § 1140.

2. In the courts below, there was an additional plaintiff. Together, the nine original Plaintiffs were all the persons who were affected by GE's actions.

to its new location in Malvern. The P&C operation was part of a separate GE business from SPCO, GE's Electrical Distribution and Control business.

Before the move of SPCO to Malvern, GE regularly referred to the proposed new location as a "plant." While SPCO was at Malvern, GE's personnel department referred to the manager of SPCO as a "Plant Manager," and a GE personnel director referred to the "two plants" at Malvern in testimony in this case. As parts of separate GE businesses, SPCO and P&C reported through different channels to corporate headquarters. SPCO was treated by the P&C business much the same as the P&C business treated non-GE tenants at the same facilities. For example, SPCO had to pay for services it received from the P&C business, such as telephone and electrical service. In brief, SPCO and P&C made different products and were treated differently for corporate reporting and accounting purposes.

B. The ERISA Plans

In 1994, GE closed its SPCO operation. At the time, GE sponsored the GE Pension Plan (hereinafter, the Pension Plan) a pension plan that was an employee pension benefit plan as defined in ERISA, 29 U.S.C. § 1002(2)(A). GE also sponsored the GE Layoff Benefit Plan for Exempt Salaried Employees (hereinafter, Layoff Benefit Plan), an employee welfare benefit plan that was a welfare plan as defined in 29 U.S.C. § 1002(1). GE served as the "named fiduciary" for ERISA purposes for both Plans.

The Plans provided for enhanced Plant Closing Benefits for qualified employees who lost their jobs because of a "plant closing." In both the Pension Plan and the Layoff Benefit Plan of GE, "Plant Closing" is defined in the same language:

> The terms "plant closing" and "to close a plant" mean the announcement and carrying out of a plan to terminate and discontinue all Company operations at any plant, service shop or other facility.
>
> Such terms do not refer to the termination and discontinuance of only part of the Company's operations at any plant, service shop or other facility nor to the termination or discontinuance of all of its former operations coupled with the announced intention to commence there either larger or smaller other operations. Any Employees released by such latter changes will be considered as out for lack of work and will be subject to provisions applicable to those on layoff.
>
> Also, such terms do not refer to the transfer or sale of such operations to a successor employer who offers continued employment to Company employees. Company Employees who are not offered continued employment by the Company or by the successor employer will be considered as out for lack of work and will be subject to provisions applicable to those on layoff.

There is no definition of "plant," "service shop," or "facility" in GE's Plans. In 1992, GE had granted Plant Closing Benefits when it closed one of two separate business operations that had occupied physically connected facilities in Milwaukee, leaving a separate GE business functioning there.

Under the Layoff Benefit Plan, laid off employees were entitled to severance pay equal to one week's pay for each year of service. For those laid off because of a "Plant Closing," severance was to be calculated at two weeks' pay for each year of service for those employees, like the Petitioners, who had 15 or more years of service. The severance payments were an unfunded obligation, to be paid from GE's general assets, not its pension fund or any other special fund. Thus, GE had a direct interest in denying Plant Closing Layoff Benefits. The denial was a direct saving for GE of every dollar it would otherwise have paid.

Under the Pension Plan, employees displaced by a "Plant Closing" who had not yet reached the retirement age of 60, could obtain an unreduced early pension under the "Plant Closing Pension Option," if they had attained age 50 and had served in GE's employment for a minimum number of years, ranging from 10 to 35. Based on their ages and years of service, Petitioners Canonico, Ricketts and Trefz were eligible for early retirement if there was a "Plant Closing," and Petitioners Willinger and Woolf were to receive an unreduced pension if there was a "Plant Closing."

C. The Denials Of Benefits

GE's contract with unionized workers at SPCO provided for Plant Closing Benefits when company operations were affected by a closure that "result[s] in the termination of all employees represented by the Union at that location when those employees do not have displacement rights." When the SPCO closing was being planned, GE first decided that the closing would be called a "product line exit," not a "plant closing" as to unionized employees at the SPCO. "Product line exit" is not a term in GE's Plans. The concept does appear in the union contract, which refers to bumping rights if there is a

"discontinuance of a discrete, unreplaced product line." The union contract provided that the unionized SPCO employees had special, broadened bumping rights when their jobs were eliminated by discontinuance of a product line. Those rights became effective when the SPCO was closed, and therefore, under the union contract, there could be no "plant closing" because union members had displacement rights. The nonunion Petitioners had no such rights.

GE's decision, acting as an employer, that union members would not receive Plant Closing Benefits for the SPCO closing, controlled all of GE's decisions, acting as plan administrator, regarding Petitioners. GE did not want to grant Plant Closing Benefits for one group of employees, the nonunion Petitioners, while denying those benefits to another group, the unionized employees.

GE's Layoff Benefit Plan and Pension Plan gave discretion to the Plan Administrators (that is, to GE itself as to the Layoff Benefit Plan and to GE itself and its Pension Board as to the Pension Plan) to interpret their terms. Petitioners sought Plant Closing Benefits under both Plans, but were denied. Thereafter, Petitioners' appeals to GE's Pension Board (under the Pension Plan; there was no appeal from the denial of Layoff Benefits) were denied. The Pension Board members wanted to avoid defining the SPCO closing as a "plant closing" for nonunion employees, when it had already been established that union employees would not receive Plant Closing Benefits.

The District Court granted Respondents' motion for summary judgment. It utilized a deferential standard of review, and found GE's decision neither unreasonable nor arbitrary and capricious. App. 22a. It held that *Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101 (1989) did not require a heightened review, even if GE was in a conflict of interest. App. 17a-18a.

The Court of Appeals for the Third Circuit affirmed on June 9, 1997, holding that there was "no error" in the District Court's determination, even as to what it referred to as "the alleged conflict of interest." App. 4a. On July 7, 1997, the Court of Appeals denied Petitioners' Petition for Rehearing *En Banc*. App. 25a-26a.

REASONS FOR GRANTING THE WRIT

In *Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that principles of trust law govern review of ERISA plans, requiring *de novo* review of benefit decisions, regardless of whether the plan is funded or unfunded, and regardless of whether the plan administrator is acting under a conflict of interest. In dictum, the Court added that if a plan grants discretion to a plan administrator, review should be for abuse of discretion, and that if an administrator with discretion is operating under a conflict of interest, that conflict would be "a factor" in determining whether there was an abuse of discretion. *Id.*, 489 U.S. at 115.

There were several conflicts of interest affecting GE in this case. First, because the Layoff Benefit Plan provided for unfunded severance payments, GE saved money by denying Petitioners benefits. That saving was a direct saving of every dollar that GE would have had to pay in Plant Closing Layoff Benefits. Second, the denial of Plant Closing Benefits was to serve a purpose other than the interests of Petitioners. Once GE determined, with the apparent acquiescence of the union, that the union employees would not receive Plant Closing Benefits, the denial of benefits to Petitioners had to be important to GE's labor relations, to avoid unsettling the union by granting Petitioners benefits that union members did not receive. GE may well have bought good labor relations at the expense of Petitioners' rights as beneficiaries of the Plans. Third, the decision of the Pension Board, composed of GE executives, was

tainted by the fact that union employees did not receive Plant Closing Benefits. Pension Board members knew that the union employees did not receive Plant Closing Benefits, and they did not want to define the SPCO closing as a "Plant Closing" for nonunion employees but not for union employees. Fourth, Pension Board members knew that granting benefits to Petitioners would have increased the cost to GE. Fifth, the Pension Board discussion was led by one of its members who had originally approved the decision that the SPCO closing was not to be a "Plant Closing."

This case seeks a determination that judicial review of an administrator acting under a conflict of interest should be *de nova*. The issue is important for establishing a uniform standard for ERISA jurisprudence. The circuits are divided in their application of the *Firestone* dictum, and have devised vague and unworkable standards.

I.

THE DECISIONS OF THE COURTS OF APPEALS ARE IN CONFLICT AND THERE IS NO NATIONAL STANDARD FOR ERISA REVIEW.

The Court of Appeals in this case merely noted that "Following *Firestone*, the district court considered the defendants' alleged conflict of interest as a factor, but concluded that it did not fatally infect the defendants' interpretation of the plan. We find no error in this determination."[3] App. 4a. The District Court applied a deferential standard of review, holding

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3. The decision in the instant case was apparently contrary to dictum in an earlier case, in which the Third Circuit had suggested that a conflict of interest "counsels in favor of withholding deference." *See Kotrosits v. GATX Corp. Non-Contributory Pension*, 970 F.2d 1165, 1173 (3d Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992).

GE's determinations to be neither unreasonable nor arbitrary and capricious. App. 22a.

The *Firestone* dictum has not proven to be sufficient guidance for the lower courts. There is a clear conflict in the circuits. The Second Circuit holds that if an administrator acts under a conflict and the beneficiary proves that the conflict influenced the decision, review is *de novo. Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251 (2d Cir. 1996). In the Eleventh Circuit, if an administrator acts under a conflict of interest, the burden shifts to the administrator to demonstrate that its interpretation is not based on its self-interest. If the court's *de novo* review determines that the decision was wrong but reasonable, the decision is deemed an abuse of discretion unless the administrator can justify the decision as benefiting the class of participants and beneficiaries. *Brown v. Blue Cross & Blue Shield,* 898 F.2d 1556 (11th Cir. 1990), *cert. denied,* 498 U.S. 1040 (1991).[4] In the Ninth Circuit, a different but similar rule is applied: If the self-interest of the administrator caused a breach of his fiduciary duty to the beneficiary, review is *de novo* unless the administrator meets the burden of proving that the conflict did not affect his decision. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995). In the District of Columbia, a fiduciary who must pay benefits from his own funds is in a conflict, and so is entitled to no deference. *Wilson v. Group Hospitalization,* 791 F. Supp. 309 (D. D.C. 1992), *appeal dis'd,* 995 F.2d 306 (D.C. Cir. 1993).

In contrast, other circuits apply the abuse of discretion standard,[5] and find that a conflict results, in the Tenth Circuit,

4. The Secretary of Labor filed an *Amicus Curiae* Brief in the Court of Appeals in the instant case, urging adoption of the *Brown* standard.

5. The courts refer to "abuse of discretion" and "arbitrary and capricious" interchangeably.

in a "sliding scale" of deference, *Chambers v. Family Health Plan Corp.*, 100 F.3d 818 (10th Cir. 1996), or, in the Fourth Circuit, ". . . deference . . . lessened to the degree necessary to neutralize any untoward influence resulting from the conflict," *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80 (4th Cir. 1993). In the Fifth Circuit and the Third Circuit (in the instant case), a conflict of interest does not affect the standard of review but is a factor to be considered in determining whether there was an abuse of discretion. *See Bellaire General Hospital v. Blue Cross & Blue Shield*, 97 F.3d 822 (5th Cir. 1996). The Sixth Circuit reviews determinations of conflicted administrators according to a reasonableness standard. *See Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991). The Seventh Circuit has held that there is no conflict of interest if benefits are to be paid from unfunded company assets, but that if there were a conflict, the court will give the abuse of discretion standard "more bite." *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 815 (7th Cir. 1997). In the Eighth Circuit, the standard of review in such cases is still open. *See Buttram v. Central States, Southeast & Southwest Areas Health & Welfare Fund*, 76 F.3d 896, 900 n.6 (8th Cir. 1996).

In the wake of *Firestone*, there is no single standard for reviewing the actions of ERISA administrators who, as fiduciaries under the statute, 29 U.S.C. § 1102(a), deny benefits while operating under conflicts of interest. Indeed, the Seventh Circuit departs from the weight of authority in suggesting that the obligation to pay unfunded benefits does not create a conflict, *see Chojnacki v. Georgia-Pacific Corp., supra*, while others, invoking traditional trust law principles, recognize that the obligation creates an inherent conflict. *See, e.g., Doe v. Group Hospitalization & Medical Services, supra; Salley v. E.I Du Pont de Nemours & Co.*, 966 F.2d 1011 (5th Cir. 1992); *Brown v. Blue Cross & Blue Shield, supra.* In the instant case, the Circuit Court referred to the "alleged conflict of interest," without acknowledging any of the conflicts that GE operated under. App. 4a.

It is essential that this Court articulate a single standard that effectuates the principles of trust law, and that can be applied with certainty and objectivity. The current mix of standards, with varying burden shifts and sliding scales of deference, from "lessened deference" to deference with "more bite," is a hodgepodge that lacks consistency, real meaning, and any guidance for lower courts, plan beneficiaries and administrators. A straightforward requirement of *de novo* review is required.

II.

THE DECISION OF THE COURT OF APPEALS WAS ERRONEOUS.

Well-established principles of trust law require a *de novo* review in cases where an ERISA plan administrator acts in a conflict of interest. An ERISA fiduciary must discharge his duties ". . . for the *exclusive* purpose of: (i) providing benefits to participants and their beneficiaries; . . ." 29 U.S.C. § 1104(1)(A) (emphasis added). That section is a clear statement of trust law as summarized in the leading authorities.

> The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed on the trustee not because of any provision in the terms of the trust but because of the relationship that arises from the creation of the trust. . . . He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.

2A Scott & Fratcher, Trusts, § 170, at 311 (4th ed. 1987).

> But when the trustee acts in his own interest in connection with the performance of his duties as trustee, the standard of behavior becomes more rigorous. In such a case his interest must yield to that of the beneficiaries. Where he deals directly with the beneficiary, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable. ***When he acts without the consent of the beneficiaries, the transaction will be set aside even though it was otherwise fair and reasonable.***

Id., § 170.25 (emphasis added). The same principle is set out in the Restatement: "The trustee is under a duty to the beneficiary to administer the trust *solely* in the interest of the beneficiary." Restatement, Trusts (Second), § 170(1) (1959) (emphasis added). And, Bogert & Bogert, Trusts & Trustees, § 543, at 217 (Rev. 2d ed. 1993), state, "Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons."

This Court has recognized the singular duty of loyalty in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981):

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts § 170(1) (1957); 2 A. Scott, Law of Trusts § 170 (1967). To deter

> the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity." Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (Cardozo, C.J.). A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one." [Citation omitted.]

Id., 453 U.S. at 329-330. The *Amax Coal* formulation of a trustee's duty has been cited with approval by this Court in *Varity Corp. v. Howe*, __ U.S. __, 134 L. Ed. 2d 130, 158 n.6 (1996), and in *Concrete Pipe and Products of California. Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 616 (1993), both ERISA cases.

Firestone cited Comment *d* to § 187 of the Restatement in the dictum that a conflict of interest is a factor to be weighed in determining whether an ERISA fiduciary abused his discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Also on point, though, is Comment *g* to Restatement § 187, which provides,

> The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive, that is *where he acts from a motive other than to further the purposes of the trust.* Thus, if the trustee in exercising or failing to exercise a power does so because of spite or prejudice or *to further some interest of his own or of a person other than the beneficiary,* the court

> will interpose. Although ordinarily the court will not inquire into the motives of the trustee, yet *if it is shown that his motives were improper or that he could not have acted from a proper motive, the court will interpose.* In the determination of the question whether the trustee in the exercise of a power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

(Emphasis added.) Thus, an improper motive, even without a finding of bad faith, is a basis for the court to undo a trustee's actions. 3 Scott & Fratcher, Trusts, § 187.5, at 46 (4th ed. 1988). *Accord, Colton v. Colton,* 127 U.S. 300, 321 (1888).

GE, in denying benefits from an unfunded plan, was in an unavoidable, inherent conflict of interest under trust principles, and acted with an "improper motive." In addition, to the extent that GE was motivated to deny Petitioners' benefits to maintain union peace, it acted with an "improper motive," to further its own interest and the interests of the union, a party "other than the beneficiary."

Under ERISA, employers are permitted to be plan administrators. *See* 29 U.S.C. § 1108(c)(3). As is common practice, GE is the administrator of its plans in the instant case. That arrangement, which reduces the cost of plan administration, is antithetical to the usual trust, in which a settler designates a separate person to be the trustee. In the traditional arrangement, deference to the trustee who is granted discretion in the Plan is merely effectuating the settlor's wishes. Under ERISA, deference to the company as administrator is a departure from all the principles that prohibit self-dealing by trustees. *See generally* Langbein, The Supreme Court Flunks Trusts, 1990 Sup. Ct. Review 207, 213-216.

The fact that Congress allowed employers to be plan administrators does not require that those conflicted fiduciaries should be judged by the same standard of review as an independent trustee. This Court must require that a conflicted plan administrator is to be reviewed *de novo.* ERISA requires no less. The statute is intended "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. § 1001(b), and "to increase the likelihood that participants and their beneficiaries under single-employer benefit pension plans will receive their full benefits." 29 U.S.C. § 1001b(c)(3) (Supp. 1997).

The remedial purposes of ERISA are lost if a reviewing court must give any deference to a conflicted plan administrator. And deference in such a case is a retreat from all the principles that hold a trustee may not divide his loyalties.

In *Firestone,* this Court held that adopting a standard of review for arbitrary and capricious actions in all ERISA cases ". . . would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," *Firestone Tire & Rubber Co. v. Bruch, supra,* 489 U.S. at 114, a result that would be counter to Congress' intention that ERISA protect plan beneficiaries. This Court need not disturb its holding in *Firestone,* that, unless ERISA plans grant discretion to their administrators to interpret the plans, *de novo* review is required. This Court may not need to disturb its dictum in *Firestone* that, if an administrator is granted discretion, review is for abuse of that discretion. But this Court should enunciate the proper standard of review of a conflicted administrator who has discretion, and hold that *de novo* review is required.

III.

THE QUESTION PRESENTED IS IMPORTANT.

This Court has recognized the importance of ERISA. "ERISA is, we have observed, a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)." *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993). This Court has also acknowledged ". . . the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force. ERISA is designed to ensure the proper administration of pension and welfare plans, both during the years of the employee's active service and in his or her retirement years." *Boggs v. Boggs*, __ U.S. __, 117 S. Ct. 1754, 138 L. Ed. 2d 45, 54 (1997).

Congress has expressly found that ". . . the continued well-being and security of millions of employees and their dependents are directly affected by . . . plans [that ERISA regulates]," and that those plans are ". . . an important factor affecting the stability of employment and the successful development of industrial relations; . . . . " 29 U.S.C. § 1101(a).

Given, then, the central role that ERISA plans play both in the national economy and in the lives of millions of Americans, a clearly-defined national standard of review is essential both for the smooth functioning of employer-employee relations, and for uniformity of interpretation. ERISA administrators and ERISA beneficiaries need an objective, well-defined standard of review when they are faced with actual or contemplated judicial enforcement of ERISA rights. The dictum in *Firestone* is inadequate to provide a standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 9, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1879

WILLIAM H. TOBIN; FRANK J. CANONCIO, III; EDWARD P. DOYLE; LARS O. ERIKSSON; DANTE E. PICCONE; KENNETH R. RICKETTS; LOUIS TREFZ; LAWRENCE J. WILLINGER; GERALD A. WOOLF,

Appellants

v.

GENERAL ELECTRIC CO.; JOHN F. WELCH, JR.; GE PENSION TRUST,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civ. No. 95-cv-04003)
District Judge: Honorable Donald W. VanArtsdalen

Submitted Pursuant To Third Circuit LAR 34.1 (a)
May 21, 1997
Before: GREENBERG, ROTH, and WEIS, *Circuit Judges.*

Filed JUN 9 1997

Appendix A

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this ERISA case, plaintiffs appeal the entry of summary judgment in favor of defendants denying additional benefits in the event of a "plant closing." Defendants contended that there had been no "plant closing," and the district court held that the defendants' characterization was not unreasonable. We agree and will affirm.

I.

The nine plaintiffs were formerly employed by defendant General Electric in one of the company's subdivisions located at Malvern, Pennsylvania. Plaintiffs were nonunion, salaried employees in the Static Power Components Operation, which was located in a portion of a building shared with another General Electric subdivision known as "P&C." In 1994, defendant sold the Static Power unit and terminated the plaintiffs' employment. Even though the company continued the P&C operations, plaintiffs contend that the Static Power unit was a separate facility or "plant," and that its sale triggered additional layoff and pension benefits under those respective plans.

Following *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101 (1989), the district court applied a discretionary standard of review to the determination that no plant closing had occurred. Although the benefit plans did not define the term "plant," the court agreed with defendants that the Malvern site was "a single facility housing separate product lines."

The court pointed out that Static Power and P&C occupied the same building, shared a common wall, permitted employees free access to the entire building, and kept all doors unlocked. The two businesses shared common services as well as integrated job listings. Although plaintiffs were not union members, the court noted that one local bargaining unit represented employees of both Static Power and P&C and that defendants did not provide plant closing benefits to its unionized employees. Based on this record, the court concluded that the defendants' characterization of the closing was not unreasonable.

II.

Plaintiffs argue that the district court should have applied a *de novo* standard of review instead of a discretionary standard. They assert that: (1) defendants did not exercise discretion; (2) the defendants' decision to deny benefits was a product of a conflict of interest; (3) the pension board did not grant plaintiffs a full and fair review of their claims; and (4) the closing of Static Power was actually a plant closing.

In *Firestone*, 489 U.S. at 115, the Supreme Court directed that we should exercise *de novo* review over a denial of benefits under ERISA "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." It is undisputed that both the layoff and the pension plans at issue in this case grant defendants discretion to interpret their terms. The district court therefore properly applied a deferential standard of review to the defendants' decision to deny additional benefits. *See, e.g., Hullett v. Towers, Perrin, Forster & Crosby. Inc.*, 38 F.3d 107, 114 (3d Cir. 1994) (arbitrary and capricious is the appropriate standard of review for discretionary decisions to deny benefits).

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Although plaintiffs contend that defendants did not exercise discretion, the district court noted that the defendants' pension board met twice to review the plaintiffs' claims for plant closing benefits. In addition, management employees separately denied layoff benefits. The plaintiffs' citation of *Moench v. Robertson*, 62 F.3d 553, 567-68 (3d Cir. 1995) (no evidence in the record that benefit committee "actually deliberated, discussed or interpreted the plan in any formal manner") is not helpful.

Following *Firestone*, the district court considered the defendants' alleged conflict of interest as a factor, but concluded that it did not fatally infect the defendants' interpretation of the plan. We find no error in this determination. As to the pension board's review of the plaintiffs' claims, we have reviewed the record and are unpersuaded by the plaintiffs' allegations of procedural error.

We are persuaded that the district court did not err in finding that no plant closing had occurred. The district court carefully considered and rejected the plaintiffs' arguments on that score.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

s/ Weis
United States Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1879

WILLIAM H. TOBIN; FRANK J. CANONCIO, III; EDWARD P. DOYLE; LARS O. ERIKSSON; DANTE E. PICCONE; KENNETH R. RICKETTS; LOUIS TREFZ; LAWRENCE J. WILLINGER; GERALD A. WOOLF,

Appellants

v.

GENERAL ELECTRIC CO.; JOHN F. WELCH, JR.; GE PENSION TRUST,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Before: GREENBERG, ROTH, and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on May 21, 1997.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the District Court entered September 24, 1996 be and the same is hereby affirmed.

Appendix A

Costs taxed against appellants.

ATTEST:
s/ P. Douglas Sisk
Clerk

Date: JUN 9 1997

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 24, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 95-4003

WILLIAM H. TOBIN, ET AL.

Plaintiffs

v.

GENERAL ELECTRIC COMPANY, ET AL.

Defendants

MEMORANDUM AND ORDER

VanARTSDALEN, S.J.

Plaintiffs, nine former non-union employees of Defendant General Electric Company ("GE"), allege that the defendants wrongfully denied their claims for "plant closing" benefits pursuant to the GE Pension Plan and the GE Layoff Benefit Plan ("the Plans"). These Plans, which are subject to the provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et. seq. ("ERISA"), offer enhanced retirement and severance benefits to employees laid off by reason of a "plant closing." In Counts I and II of their Amended Complaint,

plaintiffs challenge defendants' denial of plaintiffs' claims for plant closing benefits pursuant to ERISA §502, 29 U.S.C. §1132(a)(1)(B). Count IV further alleges discrimination by GE and its CEO John Welch in violation of ERISA § 510, 29 U.S.C. § 1140.[1] Defendants have moved for summary judgment on each of these claims.

I. Factual Background

This dispute arises from the closing of a GE operation at its Malvern, Pennsylvania facility. As a large, publicly held corporation, GE operates a variety of diverse businesses. GE employed each of the plaintiffs in its Static Power Components Operation ("SPCO"), which manufactured industrial semi-conductors. In 1985, GE transferred the SPCO operation from Collingdale, Pennsylvania to Malvern, where the Production and Control ("P&C") business, which manufactured metering and control systems, was already in operation. SPCO and P&C operated as lines of separate GE businesses.

In 1994, GE sold all the assets of SPCO and closed the operation. As a result of this sale, GE laid off the plaintiffs. The Pension Plan and Layoff Benefit Plan each provide additional benefits to employees laid off pursuant to a "plant closing" that are unavailable to employees laid off for other reasons: the Pension Plan affords expanded opportunities for early retirement and the Layoff Benefit Plan offers increased severance pay. Asserting that the closing of SPCO constituted a plant closing, plaintiffs applied for enhanced benefits pursuant to the Plans. GE, contending in contrast that the shut-down of SPCO was a

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1. By Order dated October 6, 1996, Count III of the Amended Complaint (29 U.S.C. § 1132(c) civil penalty claims for failure of Administrator to supply requested information) was dismissed.

mere "product line exit," denied the claims for plant closing benefits.[2] The parties agree that the plaintiffs' rights to enhanced benefits depend upon whether, within the meaning of the Plans, a "plant closing" occurred.

Both Plans define a "plant closing" as:

> the announcement and carrying out of a plan to terminate and discontinue all Company operations at any plant, service shop or other facility.
>
> Such terms do not refer to the termination and discontinuance of only part of the Company's operations at any plant, service shop or other facility nor to the termination or discontinuance of all of its former operations coupled with the announced intention to commence there either larger or smaller other operations.

Defendants contend that GE maintained one plant in Malvern, at which it operated two businesses. By closing SPCO, defendants argue, GE merely eliminated one product line, causing a "product line exit," not a plant closing. Because GE continued the P&C operation, defendants contend that there was

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2. GE is the administrator of both the Plans. Under the Pension Plan, GE has created a Pension Board to manage the operation and administration of the Plan. This Pension Board reviewed and denied plaintiffs' claims for plant closing pension benefits in October 1994, and again in February 1995. GE management employees, rather than the Pension Board, denied the claims arising under the Layoff Benefit Plan.

no termination of "all Company operations" within the meaning of the Plans.

The Plans do not, however, define "plant, service shop or other facility" for the purposes of determining when a discontinuance of all Company operations at a single "plant, service shop or other facility" has occurred. Plaintiffs contend that SPCO was a separate plant from P&C, and that GE's closing of all SPCO operations caused a termination or discontinuance of all GE operations at that plant. There is no real dispute as to the underlying facts; rather, the parties argue for different interpretations of those facts.

Although SPCO and P&C manufactured different products and reported to different GE businesses,[3] a single building housed both operations. The two operations occupied separate portions of the building: the P&C business in an area referred to as Malvern I, and SPCO in the area known as Malvern II. Furthermore, SPCO and P&C had separate main entrances, and SPCO visitors reported directly to the SPCO entrance. Separate lease terms applied to the different sections of the building.[4] After 1992, in addition, Malvern I and Malvern II had separate mailing addresses,[5] and SPCO employees had a separate alarm

3. SPCO was part of the GE Industrial and Power Systems business, while P&C was part of GE's Electrical Distribution and Control business.

4. The building was enlarged in or about 1985 to accommodate SPCO when it moved from Collingdale to Malvern. At that time, GE and its lessor amended the lease to provide for the additional space. Plaintiff maintains that two different leases applied to Malvern I and Malvern II. Although conceding that different lease terms did apply, defendants argue that a single lease covered the entire facility.

5. From 1985 to 1992, Malvern I and Malvern II did share one mailing address.

system and access cards to unlock external doors.[6] Subsequent to the sale of SPCO, the purchaser, Silicon Power Company, has continued the same manufacturing operations in the space SPCO formerly occupied.[7] These factors emphasize the separation between the SPCO and P&C operations, and bolster plaintiffs' contention that the shut down of SPCO qualifies as a plant closing.

Defendants note, however, that the SPCO and P&C operations shared a common roofline and were separated only by a common wall. GE employees enjoyed unrestricted access to both sections of the building through unlocked doors and a common shipping and receiving dock. Although Silicon Power has continued to use the former SPCO space, those doors have been sealed. One OSHA safety committee assumed responsibility for the entire facility, and the same union represented both SPCO and P&C employees as part of the same collective bargaining unit. Through an integrated job posting system, available positions in both the SPCO and the P&C operations were posted in the different sections of the building, and unionized employees in both operations had bumping rights.[8]

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6. Prior to the consolidation of SPCO operations at their separate mailing address, the record suggests that one alarm system covered the entire facility. While some disagreement may exist as to the alarm system subsequent to that time, for purposes of this motion, I will accept as true plaintiffs' allegations.

7. In fact, defendants assert in their brief that eight of the nine plaintiffs continued to work for Silicon Power after the sale of SPCO. Plaintiffs do not contest that assertion.

8. Plaintiffs emphasize that job qualifications and classifications, which restrict job transferability, sharply limit these bumping rights. Plaintiffs do not dispute, however, that certain rights did exist.

Defendants further emphasize that SPCO and P&C shared services at the Malvern facility. In addition to common computer, telephone, and electrical systems, the operations also shared the services of one on-site nurse and one security guard service. Although plaintiffs do not dispute these facts, they do challenge their relevance. SPCO paid P&C for the services provided, and other, non-GE tenants in the building also utilized the electrical and telephone systems. Plaintiffs therefore argue that such shared services do not support defendants' determination that the two operations were part of a single plant.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 248. A court must consider the evidence, and all inferences drawn from it, in the light most favorable to the nonmoving party. *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

B. Claims for Plant Closing Benefits

Plaintiffs have, pursuant to §1132(a)(1)(B), challenged defendants' determination of their benefit eligibility. Section

Appendix B

§1132(a)(1)(B) provides that "[a] civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132 (a)(1)(B). The foregoing discussion indicates that both parties have asserted viable arguments in support of their interpretations of the Plans. Since plaintiffs' entitlement to benefits depends upon whether there was a "plant closing" within the meaning of the Plans, the standard of review applied to the defendants' construction of the term is crucial. Although ERISA does not itself set forth the appropriate standard of review for such actions, the Supreme Court has, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 99 (1989), addressed the issue.

In that case, The Firestone Tire and Rubber Company ("Firestone") maintained a termination pay plan which provided severance benefits to employees laid off as a result of a "reduction in force." *Id.* at 105-06. Employees terminated subsequent to the sale of Firestone's Plastics Division sought severance pay benefits under the plan. *Id.* Determining that the sale did not constitute a "reduction in work force," Firestone denied those benefits, and the employees filed a class action under §1132(a)(1). *Id.*

Noting that "ERISA abounds with the language and terminology of trust law," the Court applied trust law principles to determine the appropriate standard of review. *Id.* at 110. Generally, a court will defer to a trustee's reasonable interpretation where the trust document specifically grants the trustee the power to construe disputed terms. *See id.* at 111. In the absence of such a grant, however, courts "construe terms in trust agreements without deferring to either party's

interpretation." *Id.* at 112. The Court therefore held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115.

The implication of the Court's holding is that, where a plan does grant an administrator discretionary authority, a court should apply a deferential standard of review. "Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at 111 (citing Restatement (Second) of Trusts § 187 (1959)). Accordingly, "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.* (citing G. Bogert & G. Bogert, Law of Trusts and Trustees § 559, at 169-171).

Third Circuit cases subsequent to *Firestone* support the application of a deferential standard of review where a plan grants an administrator discretionary authority. "[T]he arbitrary and capricious standard [applies where] the plan contains provisions which give the administrator discretion in making eligibility determinations." *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990).[9] The terms of the Plans thus

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9. For examples of other cases applying a deferential standard of review to the benefit eligibility decisions of plan administrators, see *Epright v. Environmental Resources Management, Inc.*, 81 F.3d 335, 342-43 (3d Cir. 1996); *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 114 (3d Cir. 1994); *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1141 (3d Cir. 1993); *Abnathya v. Hoffman-LaRoche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993); *Moats v. United Mine Workers of America Health and Retirement Fund*, 981 F.2d 685, 687 (3d Cir. 1992); *Kotrosits v. GATX Corp. Non-Contributory Pension Plan For Salaried Employees*, 970 F.2d 1165, 1172-1173 (3d Cir. 1992); *Nazay v. Miller*, 949 F.2d 1323, 1335 (3d Cir. 1991).

determine the standard of review. The initial question is whether the Plans at issue vested discretionary authority in the administrator.

Because plaintiffs assert benefit claims pursuant to both the Pension Plan and the Layoff Benefit Plan, I will consider the relevant provisions of each Plan. The Pension Plan names GE as the administrator, and provides that "the control and management of the operation and administration of the Plan shall be vested in a Pension Board." The Plan further states that:

> Any determination, decision or action of any Named Fiduciary or other entity having powers, duties, obligations and responsibilities with respect to the Plan concerning or with respect to any question arising out of or in connection with the construction, interpretation, administration and application of the Plan and of its rules and regulations, shall lie within the absolute discretion of such Named Fiduciary or other entity . . . .

The plan specifically includes the Pension Board in the definition of a "Named Fiduciary," and this language unambiguously grants the Pension Board the right to interpret the terms of the Plan. In October 1994 and February 1995, the Pension Board considered plaintiffs' claims for benefits, and concluded that the SPCO shut-down did not constitute a "plant closing" within the meaning of the Plan.

The Layoff Benefit Plan provides that:

> the management and control of the operation

> and administration of the Plan shall be vested in the Company. The Company will solely make all determinations with respect to eligibility and benefits under this Plan and such determinations will be final and binding. Accordingly, the administration of any claims arising under the Plan, including the discretionary authority to interpret terms, review, pay or deny any claims and the provisions of a full and fair review of claims shall be vested exclusively in the Company. For purposes of the Act, the Company shall be the Administrator of the Plan.

Under this Plan, the term "Company" refers to "General Electric Company and its affiliates." This provision, like its counterpart in the Pension Plan, unambiguously vests in GE absolute discretionary authority to interpret the Plan. In the instant case, the Company denied plaintiffs' claims for plant closing benefits under the Layoff Benefit Plan. Human Resources Manager P.W. Jarrosiak notified Plaintiff Tobin that, because the SPCO closing did not meet the Plan definition of a plant closing, Tobin would be ineligible for plant closing benefits.[10]

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10. On these facts, the recent Third Circuit opinion in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), is not controlling. In *Moench*, former employees alleged that their Employee Stock Option Committee's continued and exclusive investment in deteriorating employer stock constituted a breach of fiduciary duty. The Committee claimed that the plan mandated that it invest solely in employer stock. Although the plan did grant the Committee discretionary authority, the court declined to apply *Firestone's* arbitrary and capricious standard because it found no evidence that the Committee "actually deliberated, discussed or interpreted the plan in any formal manner." *Id.* at 567. In the instant case, however, the Pension Board and GE formally denied plaintiffs' claims, stating in writing that the decision was grounded in their

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Despite this grant of broad discretionary authority to interpret the Plans and determine benefit eligibility, plaintiffs argue that the defendants' conflict of interests renders the deferential standard inapplicable. Although GE's dual role as sponsor and administrator of the Plans does inevitably create some conflict, I do not find that the conflict in this case mandates a heightened standard of scrutiny. The Court in *Firestone* stated that where "a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' " 489 U.S. at 115 (citing Restatement (Second) of Trusts § 187, comment d (1959)). As I read this language, the Court does not require a different standard of review in conflict situations, but merely indicates that any potential conflict is a factor to consider in an evaluation under the deferential standard.

Although such a deferential standard has been criticized as too unprotective of employee interests, I find nothing in *Firestone* to suggest that, where a Plan grants an administrator discretionary authority, any other factor — such as whether the plan is funded or unfunded or whether a conflict exists — can mandate a heightened standard of scrutiny. The court in *Abnathya v. Hoffman-LaRoche Inc.* seems to recognize that *Firestone* is controlling on this issue when it states: "[p]erhaps the Supreme Court will have an opportunity to reconsider this issue. Or perhaps Congress will consider amending ERISA to require more stringent review where an employer acts as its own plan administrator." 2 F.3d 40, 46 fn. 5 (3d Cir. 1993). Until that

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(Cont'd)
construction of the term "plant closing" in the Plans. *Moench's* additional suggestion that some cases outside the purview of §1132(a)(1)(B) may merit de novo review is also inapplicable on the facts here. *Id.* at 565. These plaintiffs assert only a claim for benefits pursuant to §1132.

time, I understand *Firestone* to require a deferential standard of review.

Accordingly, I will apply a deferential standard of review to the defendants' decision to deny plaintiffs' claims for plant closing benefits. In *Firestone,* the Court seems to refer to a reasonableness standard: "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." 489 U.S. at 111. Subsequently, the Third Circuit has referred to an arbitrary and capricious standard of review, under which "a district court may overturn a decision of the Plan administrator only if it is 'without reason, unsupported by substantial evidence or erroneous as a matter of law." *Abnathya,* 2 F.3d at 45 (quoting *Adamo v. Anchor Hocking Corp.,* 720 F. Supp. 491, 500 (W.D. Pa. 1989)). Regardless of the specific term used to describe the standard of review, I find that the defendants' decision can be considered neither unreasonable nor arbitrary and capricious.

In *Moench v. Robertson,* the court cited a series of factors to consider in evaluating the reasonableness of an administrator's decision:

> (1) whether the interpretation is consistent with the goals of the Plan; (2) whether it renders any language in the Plan meaningless or inconsistent; (3) whether it conflicts with the substantive or procedural requirements of the ERISA statute; (4) whether the [relevant entities have] interpreted the provision at issue consistently; and (5) whether the interpretation is contrary to the clear language of the Plan.

62 F.3d 553, 566 (quoting *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 371 (8th Cir. 1995) (citations omitted)). These considerations indicate that the defendants' denial of plant closing benefits withstands judicial scrutiny. GE provides additional benefits to employees laid off pursuant to a plant closing at least in part to cushion the severe impact of the company's complete departure from a community. Because GE continued the P&C operations in Malvern, the defendants' interpretation of the Plans is consistent with the general rationale underlying enhanced plant closing benefits.

Plaintiffs argue that by failing to distinguish between a plant, service shop, or other facility, the defendants' interpretation renders the Plan language meaningless and inconsistent.[11] At most, however, defendants' construction renders the language redundant. The drafters of legal documents commonly include redundant or unnecessary terms to guard against potential loopholes. Plaintiffs do concede that defendants' interpretation does not conflict with any provision of ERISA.[12]

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11. Some possible differences among the terms "plant, service shop and other facility" could exist consistent with defendants' interpretation of the Plans. For instance, a "plant" often connotes a manufacturing operation, a "service shop" may refer to an equipment repair business, and an "other facility" could describe a laboratory testing site.

12. Plaintiffs have, however, claimed that the Pension Board violated their procedural rights to a full and fair review, as guaranteed by ERISA § 503. 29 U.S.C. § 1133. In support of their position, plaintiffs cite *Grossmuller v. International Union*, 715 F.2d 853 (3d Cir. 1983). In that case, the defendants terminated the plaintiff's disability benefits on the basis of a private investigator's report that the plaintiff was otherwise gainfully employed. *Id.* at 855. The court found that the defendants deprived the plaintiff of a full and fair review by failing to inform him of the evidence upon which

(Cont'd)

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Plaintiffs further contend that the defendants' interpretation of a "plant closing" has been inconsistent. They note that GE awarded plant closing benefits to employees laid off pursuant to the closing of an appliance plant in Milwaukee, even though GE continued other operations at the same site. I am satisfied, however, that undisputed factual differences between the Malvern and Milwaukee operations could reasonably justify the differing treatment. For instance, the Milwaukee operations were housed in different buildings, separated by a barbed wire fence, and were connected only by a tunnel kept locked at all times. The SPCO and P&C operations, in contrast, shared a single building. A common wall separated the two businesses, but employees of both operations had free access to the entire building through doors kept unlocked at all times.

Furthermore, GE did not provide plant closing benefits to unionized SPCO employees. Although this decision, and the union's failure to challenge it, are largely irrelevant to whether a plant closing in fact occurred, it does indicate that the

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they relied, by refusing to interview the plaintiff himself, and by violating past practices by allowing a third party, but not the plaintiff, to appear. *Id.* at 858.

Grossmuller, however, is inapplicable on the instant facts. In contrast to *Grossmuller,* the Pension Board's decision here did not depend upon any factual determinations specific to these plaintiffs and their claims. Furthermore, the Pension Board provided plaintiffs with a written explanation of its decision to deny plant closing benefits, citing both Plan language and other factors in support of its position. *See* Plaintiffs' Amended Complaint, Exhibit C (letter from J.J. O'Brien, Secretary of the GE Pension Board, to plaintiffs' counsel). Plaintiffs' assertions that Frank Doyle influenced other Board members and that the Board members discussed the SPCO closing with other GE employees do not evidence the sort of unfairness deemed by *Grossmuller* to violate § 503.

defendants applied a consistent interpretation of the term "plant closing" to all aspects of the SPCO closing.

Finally, defendants' interpretation does not contradict the clear language of the Plans. In fact, plaintiffs' counsel admitted at oral argument that the Plan definition of a plant closing is ambiguous.[13] The Plans refer to a discontinuance of "all Company operations at any plant, service shop or other facility," but never define the terms plant, service shop, or facility. To clarify ambiguous terms, plan administrators may refer to extrinsic evidence, and the defendants here relied on both the Plan language and other evidence in reaching their decision. *See Epright v. Environmental Resources Management, Inc. Health and Welfare Plan,* 81 F.3d 335, 339 (3d Cir. 1996).

The Plan definition of plant closing specifically states that the term "do[es] not refer to the termination and discontinuance of only part of the Company's operations at any plant, service shop or other facility . . . ." Because GE continued the P&C operation at the Malvern site, such language supports defendants' determination that the SPCO closing was a mere product line exit. Despite the ambiguity in the language, the most natural reading of this provision suggests that GE did not intend plant closing benefits to apply when it continued substantial manufacturing activities at the same location and in the same building.

Furthermore, the record provides evidentiary support for

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13. Plaintiffs' counsel provided no clear definition of the terms, and suggested neither how a court should define the terms, nor what standards should be applied to determine whether a "plant closing" occurred. Plaintiffs' counsel suggested at oral argument that, as to Counts I and II, summary judgment should be granted in favor of plaintiffs.

the defendants' characterization of the Malvern operation as a single facility housing separate product lines. One local bargaining unit represented the unionized employees of both businesses, and the operations shared certain common services, as well as an integrated job posting system. Although plaintiffs point to other facts which could conceivably justify a different conclusion, defendants' determination that the SPCO shutdown did not constitute a plant closing cannot be said to be unreasonable or arbitrary and capricious. Even considering the defendants' conflict of interests, I cannot conclude that their decision was unreasonable. Because defendants' position finds support in both the Plan language and the undisputed facts, it is not " 'without reason, unsupported by substantial evidence or erroneous as a matter of law.' " *Abnathya,* 2 F.3d at 45 (quoting *Adamo v. Anchor Hocking Corp.,* 720 F. Supp. 491, 500 (W.D. Pa. 1989).[14] Defendants, therefore, are entitled to summary judgment on plaintiffs' claims for benefits pursuant to § 1132(a)(1)(B).

C. ERISA § 510 Claims

Plaintiffs further allege that Defendant GE and its CEO John Welch violated § 510 of ERISA by characterizing the SPCO closing as a product line exit rather than a plant closing. Section 510 provides that:

> [i]t shall be unlawful for any person to

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14. Accepting plaintiffs' suggestion at oral argument that Counts I and II are appropriate for summary judgment, I would find on the present record that, even under a de novo standard of review, the SPCO closing did not constitute a "plant closing" within the meaning of the Plans. Rather, GE eliminated one product manufactured at the site, while continuing other manufacturing operations.

> discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140. To establish a prima facie case, plaintiffs must prove: "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavlick v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).

Plaintiffs here concede that, if the SPCO closing does not constitute a plant closing within the meaning of the Plans, the § 510 claim must fail. As the forgoing discussion illustrates, plaintiffs cannot show that in denying the claims for plant closing benefits, the defendants wrongfully deemed the shutdown a product line exit. In the absence of such wrongful or prohibited conduct, defendants are entitled to summary judgment on plaintiffs' claims arising under ERISA § 510.

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment will be granted and judgment will be entered in favor of defendants on all claims remaining in plaintiffs' Amended Complaint.

An appropriate order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 95-4003

WILLIAM H. TOBIN, ET AL.

Plaintiffs

v.

GENERAL ELECTRIC COMPANY, ET AL.

Defendants

ORDER

For the reasons discussed in the accompanying memorandum, it is hereby ORDERED that Defendants' motion for summary judgment (filed document number 26) is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of Defendants General Electric Company, John F. Welch, Jr., and GE Pension Trust, and against Plaintiffs William H. Tobin, Frank J. Canonico, III, Edward P. Doyle, Lars O. Eriksson, Dante E. Piccone, Kenneth R. Ricketts, Louis Trefz, Lawrence J. Willinger, and Gerald A. Woolf, on all claims.

BY THE COURT
s/ Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

September 24, 1996

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 7, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1879

WILLIAM H. TOBIN; FRANK J. CANONCIO, III; EDWARD P. DOYLE; LARS O. ERIKSSON; DANTE E. PICCONE; KENNETH R. RICKETTS; LOUIS TREFZ; LAWRENCE J. WILLINGER; GERALD A. WOOLF,

Appellants

v.

GENERAL ELECTRIC CO.; JOHN F. WELCH, JR.; GE PENSION TRUST

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-4003)

SUR PETITION FOR REHEARING

BEFORE: BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and WEIS, *Circuit Judges*

The petition for rehearing filed by the appellants, William H. Tobin, Frank J. Canoncio, III, Edward P. Doyle, Lars O. Eriksson, Dante E. Piccone, Kenneth R. Ricketts, Louis Trefz, Lawrence J. Willinger, and Gerald A. Woolf, in the above

captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:
s/ illegible
Circuit Judge

DATED: JUL 7 1997

ly/cc: EBP
TDH
MLB

Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

No. 97-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM H. TOBIN, FRANK J. CANONICO, III,
LARS O. ERIKSSON, DANTE E. PICCONE,
KENNETH R. RICKETTS, LOUIS TREFZ,
LAWRENCE J. WILLINGER, GERALD A. WOOLF,
Petitioners,

v.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR.,
GE PENSION TRUST,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Did the Third Circuit Court of Appeals err in applying a deferential standard of review to a benefit determination by an employee benefit plan administrator, in view of explicit language in the plan documents reserving to the administrator the discretion to interpret the plan and decide claims for benefits?

RULE 29.6 STATEMENT

General Electric Company has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

- CAMCO, Inc. (Canada)
- General Electric Capital Corporation
  (formerly General Electric Credit Corporation)
- Montgomery Ward & Co., Inc.

Those which have only publicly-held debt securities are:

- Credit DeL'Est
- Finax FS AB
- Finax KK AB
- GE Capital Aviation Services, Ltd.
- GE Capital Mortgage Services, Inc.
- GE Capital (NZ) Ltd. (New Zealand)
- GE Capital PTY Ltd. (Australia)
- GECC Financial Corporation (Hawaii)
- GNA Corporation
- Gate Finance Corporation
- General Electric Capital Canada, Inc.
- General Electric Capital Services, Inc.
  (formerly General Electric Financial Services, Inc.)
- General Electric Credit International, N.V.
- Imaging Financial Services, Inc.
  (formerly Eastman Kodak Credit Corp.)
- International GE Capital Corporation
- Mercur Bank (Austria)
- Outlet Broadcasting, Inc.
- Service Bank GmbH

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IN THE

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OCTOBER TERM, 1997

WILLIAM H. TOBIN, FRANK J. CANONICO, III,
LARS O. ERIKSSON, DANTE E. PICCONE,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents General Electric Company ("GE" or the "Company"), John F. Welch, Jr., and GE Pension Trust (collectively "Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on June 9, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. The opinion of the District Court is unpublished, but is available at 1996 WL 544230. The opinions are attached as part of the Appendix to the Petition for Writ of Certiorari at 1a-4a and 7a-24a, respectively.

JURISDICTION

The Court of Appeals entered its judgment on June 9, 1997. The Order of the Court of Appeals denying rehearing was entered on July 7, 1997. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

This Counter Statement of the Case supplements Petitioners' Statement of the Case, which omits and misstates certain important facts.

Petitioners are eight former salaried employees of Respondent General Electric Company ("GE" or "the Company") who worked in GE's Static Power Component Operation ("SPCO"). SPCO was located in a portion of GE's Malvern, Pennsylvania facility which it shared with another GE business, the Protection and Control operation ("P&C"). In 1994, GE sold the assets of SPCO, and Petitioners ceased to be employed by GE. The P&C business, however, remains in operation at the Malvern facility. The purchaser of SPCO continues production in the same portion of the Malvern facility that was previously occupied by SPCO.

Even though eight of the nine original Plaintiffs continued to work for the purchaser, all of the Plaintiffs received layoff benefits pursuant to GE's Layoff Benefit Plan for Exempt Salaried Employees (the "Layoff Benefit Plan") in the amount of one week of pay for each full year of continuous service. Despite receiving these payments, Petitioners demanded additional benefits that are available under the GE Pension Plan (the "Pension Plan") and the Layoff Benefit Plan to employees who are terminated as a result of a "plant closing." Those "plant closing benefits"consist of an *additional*

week of severance pay for each year of continuous service at GE, plus expanded eligibility for early retirement pension benefits. A "plant closing" is defined in the Layoff Benefit Plan[1] as follows:

> [T]he announcement and carrying out of a plan to terminate and discontinue *all* Company operations at any plant, service shop or other facility.
>
> Such terms do not refer to the termination and discontinuance of only *part* of the Company's operations at any plant, service shop or other facility. . . .

(emphasis added). Petitioners claimed that GE's sale of SPCO constituted a plant closing within the meaning of the plans.

Both the Layoff Benefit Plan and the Pension Plan expressly reserved to GE the responsibility to administer GE's benefits and to exercise discretion in interpreting the plans.[2] In the exercise of this discretion, GE determined that the sale of SPCO was not a "plant closing" because, after the sale, GE continued to operate the P&C business at the Malvern facility and, therefore, had not discontinued "*all* Company operations" at that facility. GE's Pension Board, consisting of five senior officers of the Company, met initially to consider Petitioners' claims for plant closing benefits, and a second time to hear Petitioners' appeal. Both times, after reviewing detailed, written submissions from Petitioners' counsel, the Pension Board concluded that the sale of SPCO did not result in a "plant closing."

The Pension Board's conclusion was supported by substantial evidence.[3] SPCO and P&C occupied the same building

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1. In all material respects, the definition contained in the Pension Plan is identical.

2. The plan provisions granting that discretion are set forth in the District Court's opinion. Pet. App. 15a-16a.

3. Petitioners contend that "GE regularly referred to the proposed new location as a 'plant.'" Br. of Pet'rs at 3. However, these references pre-date the move of SPCO to Malvern in 1985. There is no evidence that the GE employees who made these statements knew where SPCO would be located, nor could they have anticipated the extent of its functional integration with the P&C operation. Moreover, contrary to Petitioners' assertions, the man-

and operated under a common roofline.[4] Although the two businesses were separated, in part, by a common wall, GE employees had unrestricted access to both sections of the building through unlocked doors. The two GE operations shared a multitude of services, including common payroll processing, localized human resources support, and a single shipping and receiving area. All openings for jobs in SPCO and P&C — whether union or non-union — were posted throughout the building, and employees from each business were free to apply for the positions. Perhaps most significantly, a single bargaining unit represented all GE unionized employees in the SPCO and P&C operations at the Malvern facility. Like Petitioners, the unionized SPCO employees who ceased working for GE received ordinary layoff benefits, but not plant closing benefits. After GE's sale of SPCO, six SPCO union-represented employees exercised "bumping" rights and actually displaced other bargaining unit members at P&C. In short, the Malvern facility was one structure which housed two GE operations. GE cited other, similar situations in which the exit or transfer of one of several GE businesses at a multi-business location was not treated as a plant closing; Petitioners were unable to identify any contrary applications of the controlling plan provisions.[5]

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ager of SPCO's operations in Malvern was not a "Plant Manager." *See* Br. of Pet'rs at 3. Rather, his title at GE was "Manager of Operations — SPCO."

4. Petitioners' statement that "a facility was constructed for SPCO adjacent to a building in Malvern that already housed ... [the P&C] operation" is misleading. SPCO was not housed in a separate building. Rather, SPCO relocated to the Malvern facility in an addition to the existing building.

5. Petitioners argue that GE awarded plant closing benefits to employees laid off after the closure of the appliance facility in Milwaukee, even though GE continued to operate a separate business at the same site. Br. of Pet'rs at 4. However, Petitioners fail to acknowledge the critical factual differences between the Milwaukee and Malvern situations, which the District Court found to be undisputed. Pet. App. 20a. The Milwaukee businesses were housed in different buildings, separated by an exterior, barbed-wired fence and linked only by a tunnel which was kept locked at all times. Unlike

Petitioners also suggest that GE's interpretation of the plan was motivated by self-interest. They note that the Layoff Benefit Plan was unfunded, and contend that GE's denial of plant closing benefits may have been motivated by a desire to avoid the cost of additional severance pay for nine employees. Br. of Pet'rs at 5. In that regard, Petitioners fail to acknowledge several important facts. Plant closing benefits under the Pension Plan are paid from a fully funded trust, like other pension benefits provided to GE retirees. Moreover, if GE had truly been motivated by a desire to reduce benefit costs, it could have done so rather easily, avoiding not only this litigation, but even the severance benefits which it actually paid to Petitioners. As noted above, eight of the nine original Plaintiffs went to work for the purchaser of SPCO at the same location. Under the Layoff Benefit Plan, employees who accept employment with a "successor" are not entitled to any severance pay. While GE elected not to treat the purchase of SPCO as a successorship, thereby allowing eight of the nine original Plaintiffs to each receive anywhere from twenty-one to forty-three weeks of severance pay, it could have interpreted its Layoff Benefit Plan differently and denied *any* severance benefits to plan participants who accepted positions with the purchaser of SPCO. Thus, notwithstanding Petitioners' characterizations, GE's conduct was hardly penurious or self-serving.

Petitioners' suit, filed in the Eastern District of Pennsylvania, asserted claims for benefits against both GE and the Pension Plan under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). The District Court granted Respondents' motion for summary judgment in its entirety. In accordance with *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the District Court held that a deferential standard of review applied to GE's interpretation of its own plans, and

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the GE employees in Malvern, employees of the two Milwaukee businesses were in separate bargaining units with no interchange of employees between the facilities. The circumstances in Milwaukee, therefore, have no bearing whatsoever on Petitioners' entitlement to such benefits in Malvern.

that the denial of plant closing benefits was neither unreasonable, nor arbitrary and capricious. Pet. App. 18a. In the alternative, the District Court concluded, summary judgment was warranted even under a *de novo* standard of review, based on undisputed evidence that GE's discontinuation of one of two product lines at the Malvern site did not constitute a "plant closing" under the terms of the plans. Pet. App. 22a n.14. On June 9, 1997, the Court of Appeals for the Third Circuit affirmed, specifically upholding the District Court's application of a deferential standard of review. Pet. App. 3a. Petitioners' Petition for Rehearing *En Banc* was denied by the Third Circuit on July 7, 1997.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Present Issues Warranting The Grant Of Certiorari.

A. Consistent With This Court's Decision In *Firestone*, The Third Circuit Correctly Held That A Deferential Standard Of Review Applied To A Plan Administrator's Interpretation Of An ERISA Plan Which Explicitly Grants Discretion To That Administrator.

The Third Circuit Court of Appeals followed *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in applying a deferential standard of review to GE's interpretation of its benefit plans. Pet. App. 3a. In *Firestone*, as in the instant case, the employer was both the sponsor and administrator of an unfunded severance plan. *Id.* at 105. The Firestone plan provided severance pay to employees terminated as a result of a "reduction in work force." *Id.* When Firestone sold its Plastics Division to another company which rehired most of the employees in that division, Firestone denied severance benefits to affected employees after determining that the sale did not constitute a "reduction in work force" within the meaning of the severance plan. *Id.* at 106. The employees filed suit under 29 U.S.C. § 1132(a)(1)(B) to recover those severance benefits, contesting Firestone's interpretation of the plan.

This Court held that "principles of trust law" prescribe the appropriate standard of review for § 1132(a)(1)(B) actions. *Id.* at 111. If the terms of the trust confer discretion upon the trustee to construe disputed terms, the Court noted, trust principles dictate a "deferential standard of review when a trustee exercises [those] discretionary powers." *Id.* Where the trustee is not granted such discretion, however, as was the case with the Firestone plan, courts should "review[] the employee's claim as it would ... any other contract claim ... by looking to the terms of the plan and other manifestations of the parties' intent." *Id.* at 112-13. Accordingly, this Court held that a *de novo* review of denied benefit claims is required under ERISA § 1132(a)(1)(B), *"unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."* *Id.* at 115 (emphasis added). Where the benefit plan gives the administrator such discretion, courts must apply a deferential standard of review. *Id.* at 111, 115.

Petitioners concede that both the Layoff Benefit Plan and the Pension Plan grant GE discretion to interpret their terms. Br. of Pet'rs at 6. Accordingly, the Third Circuit correctly held that *Firestone* governed the standard of review in this case, and that GE's interpretation of its benefit plans would not be disturbed unless it was arbitrary or capricious. *Firestone,* 489 U.S. at 111, 115.

1. The Alleged Conflicts Of Interest Do Not Alter The Standard Of Review.

Petitioners contend that GE's interpretation of the plant closing provisions are not entitled to deference because the managers and officers who made that interpretation were acting under a conflict of interest. Br. of Pet'rs at 7-8. In such a situation, Petitioners argue, courts should apply a *de novo,* rather than a deferential, standard of review. Br. of Pet'rs at 11-15. In effect, Petitioners ask this Court to overrule *Firestone.*

Contrary to Petitioners' characterization of the opinion, this Court specifically addressed the conflicts issue in *Firestone.* It concluded that where a benefit plan grants discre-

tion to the plan administrator, the potential for a conflict of interest does not open the administrator's decision to a *de novo* review. 489 U.S. at 115. Instead, this Court stated, "that conflict must be weighed as *a 'facto[r]* in determining whether there is an abuse of discretion.'" *Id.* (citing Restatement (Second) of Trusts § 187 comment d (1959)) (emphasis added). Accordingly, even if an administrator of a plan is acting under a potential conflict of interest, as Petitioners assert here, a court must apply a deferential standard of review. *Id.*

Petitioners acknowledge the obvious relevance of this Court's statements in *Firestone,* Br. of Pet'rs at 7, but attempt to minimize their importance by characterizing such statements as "dictum." Br. of Pet'rs at 7, 13, 15. They point out that the severance plan in *Firestone* did not reserve discretion to the plan administrator, thus precluding a deferential standard of review in that case. Although there may be some factual differences between the cases, the detailed analysis in *Firestone* cannot be disregarded. This Court carefully analyzed the issues under ERISA and the law of trusts, and clearly demarcated the boundaries that define the appropriate standards of review. Presumably, the rule of law announced by the Court was intended to provide needed guidance to the circuit courts in cases such as the instant action. To dismiss the *Firestone* decision as mere dicta would be inconsistent with the well-established rule that the reasoning and rationale of a prior decision of this Court, in addition to an actual holding, must be respected in subsequent decisions. *See Seminole Tribe of Fla. v. Florida,* 116 S. Ct. 1114, 1129 ("We adhere in this case, ... not to mere obiter dicta, but rather to the well-established rationale upon which the Court based the results of its earlier decisions."), *cert. denied,* 116 S. Ct. 1415, *and cert. denied,* 116 S. Ct. 1416 (1996); *see also Allegheny County v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 668 (1989) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.") (Kennedy, J., concurring and dissenting). The Third Circuit's decision below

adhered to the explicit language and rationale of *Firestone,* and should not be subjected to further review. *See* Sup. Ct. R. 10.

Even if this Court were to look beyond the language and rationale in *Firestone,* there would be no basis for disturbing the deference given to the plan administrator's decisions on Petitioners' claims for benefits. Petitioners presented no evidence that any bias or conflict of interest actually motivated the decision to deny plant closing benefits. In affirming the decision of the District Court, the Third Circuit noted that the lower court "considered the defendants' alleged conflict of interest as a factor, but concluded that it did not fatally infect the defendants' interpretation of the plan." Pet. App. 4a.

The Petition for Certiorari identifies two purported conflicts of interest, neither of which was found to warrant greater scrutiny of the benefit determinations. First, Petitioners contend that because GE previously determined that unionized employees at SPCO would not be eligible for plant closing benefits, this motivated GE to deny those benefits to Petitioners in order to maintain "good labor relations." Second, they argue that because the Layoff Benefit Plan was unfunded, the denial of plant closing benefits saved money for GE. Br. of Pet'rs at 7-8, 14.

As to the first alleged conflict, the plan language defining plant closing benefits was identical for both union and non-union employees. The fact that GE denied plant closing benefits to both groups and interpreted the plan language consistently does not reflect a conflict of interest. In essence, Petitioners argue that GE's interpretation of identical plan language should be accorded *less* deference merely because the interpretations were consistent. The absurdity of this argument is obvious. To the contrary, where a plan administrator is consistent in its interpretations, those interpretations should be entitled to more deference, not less. *See, e.g., Hutchins v. Champion Int'l Corp.,* 110 F.3d 1341, 1344 (CA8 1997); *Cash v. Wal-Mart Group Health Plan,* 107 F.3d 637, 641 (CA8 1997); *Brogan v. Holland,* 105 F.3d 158, 161 (CA4 1997).

As to the second purported conflict of interest, Petitioners argue that layoff benefits were paid from GE's general assets, and that GE's financial interest in the outcome of the dispute requires a *de novo* review. Br. of Pet'rs at 8.[6] In effect, Petitioners are asking this Court to eliminate the deferential standard of review whenever a plan is unfunded. This argument is entirely inconsistent with *Firestone,* which involved the identical "conflict" at issue in this case — an unfunded severance plan. Petitioners would have this Court abandon its prior rationale and adopt a sweeping new standard that would apply to thousands of unfunded benefit plans affecting millions of participants, ranging from medical benefit plans to severance pay arrangements. Respondents submit that no such abrogation of *Firestone* is warranted, especially on the facts of this case.

2. The Lower Courts Correctly Applied The Deferential Standard Of Review.

The Third Circuit's affirmance of the District Court's application of the deferential standard of review is wholly consistent with *Firestone.* In *Firestone,* this Court recognized that where a trustee is "given power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable." 489 U.S. at 111. In this case, the District Court found that Respondents' denial of plant closing benefits was neither unreasonable nor arbitrary and capricious, thus satisfying either formulation of the deferential standard of review. Pet. App. 18a. The plans at issue unequivocally conferred

6. Petitioners fail to note that the Pension Plan, unlike the Layoff Benefit Plan, is fully funded and, consequently, that the plant closing pension benefits which several of the Petitioners seek would have been paid from a fully funded plan. Thus, there is no basis for asserting a conflict of interest with regard to the decision to deny plant closing benefits under the Pension Plan. Furthermore, if the denial of plant closing pension benefits based on the Pension Board's interpretation of language in the Pension Plan is upheld under an arbitrary and capricious standard of review, there is no basis for reaching a different conclusion as to the plant closing benefits under the Layoff Benefit Plan, which contained identical operative language.

upon GE the "power to construe disputed or doubtful terms" as required by *Firestone*. 489 U.S. at 111. Specifically, the Layoff Benefit Plan provides:

> [T]he management and control of the operation and administration of the Plan shall be vested in the Company. The Company will solely make all determinations with respect to eligibility and benefits under this Plan and such determinations shall be final and binding. Accordingly, the administration of any claims arising under the Plan, including the discretionary authority to interpret terms, review, pay or deny any claims and the provisions of a full and fair review of claims shall be vested exclusively in the Company. For purposes of the Act, the Company shall be the Administrator of the Plan.

Pet. App. 15a-16a.[7] Under the Pension Plan, similar discretionary authority has been delegated to GE's Pension Board, which reviews and determines all claims for pension benefits. Pet. App. 15a. Petitioners concede that the GE plans contain the requisite reservations of discretion. Br. of Pet'rs at 6. Moreover, Petitioners do not argue in their Petition, nor can they, that GE's interpretation of the plans was unreasonable or subject to an abuse of discretion. Rather, the sole basis for their claim that the decision of the Third Circuit was erroneous is the court's application of a deferential standard of review, and as discussed above, that argument is foreclosed by *Firestone*.

B. Marginally Different Formulations Of The Standard Of Review Do Not Present "An Important Question Of Federal Law" Warranting Supreme Court Review.

Petitioners seek review of the Third Circuit Court of Appeals' decision because its description of the controlling rule of law varies slightly from formulations employed by

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7. This is consistent with Section 3(16)(A) of ERISA, 29 U.S.C. § 1102(16)(A), which allows the plan sponsor (in this case, GE) to serve as the "administrator," and which even provides that if no administrator is specifically identified in the plan document, the plan sponsor occupies that position by default.

other courts of appeals. Br. of Pet'rs at 9-10. Simply put, this is not the type of important issue that merits Supreme Court review. *See* Sup. Ct. R. 10.

The vast majority of the courts of appeals to consider the issue have held, consistent with *Firestone,* that an alleged conflict of interest does not deprive the plan administrator of a deferential standard of review if it is supported by a reservation of discretion in the plan document. At most, these courts have held, care must be taken to determine whether, as a factual matter, the alleged conflict actually infected the disputed plan interpretation. *See Chojnacki v. Georgia-Pacific Corp.,* 108 F.3d 810, 815 (CA7 1997) ("While a conflict of interest does not change the standard of review we apply to an administrator's decision, it will cause us to give the arbitrary and capricious standard more bite."); *Chambers v. Family Health Plan Corp.,* 100 F.3d 818, 825-26 (CA10 1996) (adopting "sliding scale approach" by which reviewing court applies an arbitrary and capricious standard but "decrease[s] the level of deference given to the conflicted administrator's decision in proportion to the seriousness of the conflict"); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich.,* 97 F.3d 822, 828 n.9 (CA5 1996) ("A conflict of interest does not affect the standard of review, but rather is a factor to be considered in evaluating whether the plan administrator abused his discretion."); *Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1255 (CA2 1996) ("[W]e . . . adhere to the arbitrary and capricious standard of review in cases turning on whether the decision was based on an alleged conflict of interest, unless the conflict affected the choice of a reasonable interpretation."); *Doe v. Group Hospitalization & Med. Servs.,* 3 F.3d 80, 87 (CA4 1993) ("[T]he fiduciary decision will be entitled to some deference, but this deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict."); *Miller v. Metropolitan Life Ins. Co.,* 925 F.2d 979, 984-85 (CA6 1991) (holding that administrator's decision to terminate benefits "was reasonable" in spite of the administrator's conflict of interest). The slightly different applications of the deferential standard prescribed by this Court in *Firestone* are mere "shades of grey" causing no great rift among the

courts of appeals. Accordingly, there is no "real and embarrassing conflict of opinion and authority" among the courts of appeals that would warrant review by this Court. *See Rice v. Sioux City Mem'l Park Cemetery,* 349 U.S. 70, 79 (1955) (citation omitted).

Petitioners argue that the Ninth and Eleventh Circuits have departed from this general rule. *See Atwood v. Newmont Gold Co.,* 45 F.3d 1317 (CA9 1995); *Brown v. Blue Cross & Blue Shield of Ala., Inc.,* 898 F.2d 1556 (CA11 1990), *cert. denied,* 498 U.S. 1040 (1991). However, despite Petitioners' characterizations, these opinions reflect a similar adherence to the deferential standard of review — *unless* the beneficiary demonstrates a substantial conflict of interest. *See Atwood,* 45 F.3d at 1323; *Brown,* 898 F.2d at 1563. In *Brown,* the Eleventh Circuit held that "the abuse of discretion, or arbitrary and capricious, standard applies to cases such as this one, but the application of the standard is shaped by the circumstances of the inherent conflict of interest." *Id.* Although the court modified the standard of review in the face of a conflict by shifting the burden to the plan administrator to prove that its interpretation was not tainted by self-interest, that different standard does not come into play until the "plan beneficiary *demonstrates* a substantial conflict of interest. . . ." *Id.* at 1566 (emphasis added).

Similarly, the Ninth Circuit explained,

> [w]e ultimately apply a traditional abuse of discretion standard to the decisions of apparently conflicted . . . fiduciaries unless the affected beneficiary comes forward with further evidence indicating that the conflicting interest caused a breach of the administrator's fiduciary duty to the beneficiary.

Atwood, 45 F.3d at 1322-23 (citation omitted). The Ninth Circuit only modifies the deferential standard of review if the beneficiary provides "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's obligations to the beneficiary." *Id.* at 1323.

In this case, Petitioners failed to present such "material, probative evidence" of conflict. As the Third Circuit explained, "the district court considered the defendants' alleged conflict of interest as a factor, but concluded that it did not fatally infect the defendants' interpretation of the plan." Pet. App. 4a.[8] Thus, if there are any differences in the circuit courts' descriptions of the controlling rule of law, such issues are not presented by the facts of this case.

Moreover, Petitioners fail to mention a critical finding of the District Court which is fatal to their Petition: in the alternative, the District Court applied the *de novo* standard of review and nonetheless upheld GE's denial of Petitioners' plant closing benefits. Pet. App. 22a n.14. The District Court concluded that "even under a *de novo* standard of review, the SPCO closing did not constitute a 'plant closing' within the meaning of the Plans. Rather, GE eliminated one product manufactured at the site, while continuing other manufacturing operations." *Id.* This finding was fully briefed and not disturbed on appeal. Pet. App. 4a. Thus, the resolution of a purported conflict among the circuit courts regarding the proper standard of review would be irrelevant to the ultimate outcome of the instant case, because the District Court held that under *either* standard, GE's interpretation was correct. Pet. App. 22a n.14. Accordingly, the Petition for Writ of Certiorari on this issue should be denied.

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8. In *Atwood*, the court held that a similar conflict of interest — the fact that the fiduciary was both employer and plan administrator — did not present a conflict warranting the court's departure from a deferential standard of review. 45 F.3d at 1322-23.

CONCLUSION

For the foregoing reasons, Respondents General Electric Company, John F. Welch, Jr., and GE Pension Trust respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-411

In The

Supreme Court of the United States

October Term, 1996

WILLIAM H. TOBIN, FRANK J. CANONICO, III, LARS O. ERIKSSON, DANTE E. PICCONE, KENNETH R. RICKETTS, LOUIS TREFZ, LAWRENCE J. WILLINGER, GERALD A. WOOLF,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., GE PENSION TRUST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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4 pp

Respondents' contention that the holding in *Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101 (1989) controls this case is incorrect. *Firestone* held that all ERISA plans would be reviewed *de novo*, unless the plans granted the administrators discretion to interpret their terms. The conflict created by the unfunded plan in that case was held not to be a controlling concern because the benefit denial was subject to *de novo* review. This Court expressly stated,

> . . . we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest.

Id., 489 U.S. at 115.

In *Firestone*, the plan administrator did not have discretion to interpret the plan. This Court's comments about the review to be afforded in such cases when the administrator's interests conflict with the beneficiaries' interests were not essential to the decision, and were, therefore, dicta. As this Court has held, "It is in the holdings of our cases, rather than their dicta, that we must attend, ..." *Kokkonen v. Guardian Life Ins. Co.*, __ U.S. __, 128 L. Ed. 2d 391, 396 (1994).

Respondents claim that, where plan administrators are consistent in their interpretations, their interpretations should be entitled to "more deference," citing *Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341 (8th Cir. 1997); *Cash v. Wal-Mart*

Group Health Plan, 107 F.3d 637 (8th Cir. 1997); and *Brogan v. Holland*, 105 F.3d 158 (4th Cir. 1997). None of those cases provides for "more deference." Each of them applies a five-prong test as the standard of deferential review, one prong of which is whether the plan's terms were defined consistently. Of course, GE was inconsistent in granting Plant Closing Benefits in Milwaukee but denying those benefits to Petitioners in Malvern, Pennsylvania.

Respondents' contention that Petitioners have already received *de novo* review is disingenuous. It is true that the District Judge stated in passing that he would have upheld the denial of benefits to Petitioners under *de novo* review. *See* App. B to Petition 22a, n.14. The Court of Appeals reviewed solely for abuse of discretion. *See* App. A to Petition 8a. If Petitioners are entitled to *de novo* review, they have been denied their right to appellate review of the District Judge's determination. The District Judge's decision on the point was not undisturbed by the Court of Appeals. It was ignored. The Court Appeals did not allow *de novo* review.

Much of Respondents' Brief is directed to their arguments that, on *de novo* review, they should be successful.[1] Respondents suggest that the fact that GE did not deny all severance benefits to Petitioners somehow means that GE did not violate its plan provisions for Plant Closing Benefits. It appears that GE's argument is that because it could have adopted a different inappropriate basis for refusing the Petitioners Plant Closing

1. Respondents try to demonstrate that General Electric's two operations in the Malvern location were in one facility by claiming that the two operations were under a "common roofline." Respondents' Brief in Opp. 3-4. No competent witness or other evidence in the record establishes that there was a common roofline. In fact, the two connected buildings do not share a common roofline. In any event, the nature of the roofline should not be a basis for interpreting ERISA plans that do not expressly state that rooflines are criteria for interpreting their provisions.

Benefits, the basis it chose was not inappropriate. There is, of course, no logic behind that argument. Had GE inappropriately invoked the "successor employer" clause, it would have been liable to a legal challenge.[2] The mere fact that GE could have been wrong on more than one ground does not obviate the conflict it faced when the decision was made.

More to the point, Respondents' arguments beg the immediate question whether this Court should grant the Petition and clarify the appropriate standard of review. The Petition sets out all the reasons for this Court to grant it and establish the standard for judicial review of conflicted ERISA administrators who have discretion to interpret the terms of the plans they administer.

CONCLUSION

For these reasons as well as those cited in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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2. There is no evidence in the record that would allow GE properly to invoke the successor employer provisions of its employee benefit and pension plans.